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Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of the Priority Score for the Lake  
Como Sanitary District No. 1

Case No.: IH-96-14A

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FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

On September 16, 1996, the Department of Natural Resources (Department) issued its final decision regarding Lake Como Sanitary District No. 1's (LCSD) priority score. By petition dated October 15, 1996, LCSD requested a contested case hearing pursuant to sec. 227.42, Stats., to review this determination. By letter dated November 1, 1996, the Department granted the request. On December 4, 1996, the Department requested the Division of Hearings and Appeals hold a hearing in this matter.

Pursuant to due notice a hearing was held on March 4, 5, and 6, 1997, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed briefs after the hearing. The last brief was received on March 18, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

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#### Findings of Fact

1. Lake Como Beach Subdivision (Lake Como) is a subdivision consisting of approximately 950 housing units and 2,400 residents. Lake Como was platted in the 1920's as a community of seasonal, rural cottages. Contrary to its name, Lake Como is not a waterfront community, but consists of backlots. Individual private sewage systems, such as septic tanks, mound systems, and outhouses were used to treat the area wastewater.
2. Over time Lake Como has evolved from summer cottages to mostly year-round residences. The year-round use of the wastewater disposal systems has contributed to a high rate of septic system failure. Additionally, small lot sizes, steep slopes, and high groundwater have made replacement of the failing septic systems difficult.  
  
The Walworth County Department of Planning, Zoning, and Sanitation estimates that 70% of the systems are failing with respect to high groundwater. The Walworth County Department of Planning, Zoning, and Sanitation also indicates that because of the new soil and sighting criteria, the majority of these private systems are antiquated. Consequently, replacement systems have been holding tanks.
3. The Lake Como Beach Property Owner's Association contracted a consulting engineering firm to investigate the cost effectiveness of constructing a sanitary sewer system. The consulting engineer developed a facilities plan (exhibit 5) for wastewater collection and treatment.
4. The Lake Como project includes the construction of a collection and conveyance system. The wastewater from Lake Como's collection system will be conveyed to the Walworth County Metropolitan Sewerage District (WALCOMet) treatment plant in Delevan for treatment. WALCOMet will treat the wastewater from Lake Como, along with the wastewater it already treats for other communities, and then discharge the treated wastewater to Turtle Creek. Turtle Creek is designated an Exceptional Resource Water (ERW) 9.9 miles downstream from the WALCOMet discharge point.
5. In 1995, Lake Como submitted the facility plan for its project to the Department of Natural Resources (Department) for approval. The facilities plan was subsequently

approved by the Department. In 1996, (after forming a sanitary district) Lake Como was prepared to move forward with construction of its collection system.

6. Lake Como applied to the Department for Clean Water Funding for its project. The Clean Water Fund Program (CWF) is a program that provides financial assistance (loans and grants) to municipalities for wastewater projects in the state. The Department of Natural Resources and the Department of Administration administer the program.
7. One portion of the CWF is the Hardship Program. The Hardship Program offers grants and low interest loans for wastewater projects to low income municipalities which cannot afford the standard subsidized interest rates offered in the regular CWF. Municipalities must satisfy the eligibility requirements in sec. 281.58(13), Stats., and ch. NR 163, Wis. Adm. Code, before they can receive any hardship money. Lake Como is eligible for the Hardship Program.
8. Each fiscal year a certain amount of subsidy is available for the Hardship Program - Hardship Present Value Subsidy. Since funding for the Hardship Program is limited, municipalities are assigned an environmental priority score and placed in descending order on a funding list to determine who will receive the available funding in a given fiscal year. Each October, the hardship funding list is published in a Department publication, "To the Source."
9. Once the hardship funding list is published, hardship money may be given out for eligible costs to eligible municipalities in the order they appear on the funding list. The hardship money is given out in the priority score order until the money runs out.
10. In February, 1996, Chuck Pape, a construction engineer for the Department of Natural Resources, assigned the Lake Como project a score of 70.338. Shortly after the priority scores for projects came out in March, 1996, Lake Como and WALCOMet (on behalf of Lake Como) requested additional priority score points. In May, 1996, Mr. Pape recommended Lake Como receive an additional five points pursuant to sec. NR 161.03(5), Wis. Adm. Code, and approximately sixty points pursuant to sec. NR 161.04(3), Wis. Adm. Code. On September 16, 1996, Kathy Curtner, Bureau Director for the Clean Water Fund Program, issued the final decision regarding the priority score for Lake Como's project. For Fiscal Year 1997, Lake Como was assigned a priority score of 70.338.
11. In October, 1996, the priority scores and ranking on the funding list for fiscal year 1997 were published in "To the Source." The priority score of 70.338 placed Lake Como fifth on the funding list. In October, 1996, Lake Como and WALCOMet filed a request for a hearing challenging the Department's determination of Lake Como's priority score.
12. The Lake Como project is not entitled to five points as a project which may impact an exceptional resource water. The reasoning upon which this finding is based is set forth in the "Discussion" section below.
13. The Lake Como project is not entitled to the same priority score as WALCOMet. The reasoning upon which this finding is based is set forth in the "Discussion" section below.

Applicable Law

Section NR 161.03(5), Wisconsin Administrative Code, Provides:

**OUTSTANDING AND EXCEPTIONAL RESOURCE WATERS CATEGORY SCORE.**

Any water pollution abatement project currently discharging to, or which may impact, an outstanding or exceptional resource water, designated under ss. NR 102.10 and NR 102.11, shall be assigned 5 points.

Section NR 161.04(3), Wisconsin Administrative Code, provides:

A subscribing community shall receive the same priority value as the receiving community to which it will discharge if all of the following conditions are met:

- (a) The receiving community needs to expand its treatment facility's design flow by 10% or more to treat the flow from the subscribing community.
- (b) An approved facilities plan or WPDES permit requires the receiving community facility expansion and subscribing community project to occur concurrently.
- (c) The receiving community and subscribing community have certified to the department that they will prepare and submit an intermunicipal agreement to the department prior to the award of financial assistance for construction of the project.

Discussion

The Lake Como Sanitary District No. 1 applied for hardship funding from the Clean Water fund for its proposed sewerage project (#4466-01). Pursuant to Chapter NR 161, Wis. Adm. Code, the Department calculated a priority score for the Lake Como project. The priority score for the project as calculated by the Department is 70.338. On October 15, 1996, Lake Como petitioned the Department for a contested case hearing to review the Department's priority scoring for the project. The Department granted the request with respect to two issues. The issues are:

- a. Pursuant to sec. NR 161.03(5), Wis. Adm. Code, should the Department have awarded the Lake Como project (#4466-01) five additional points?
- b. Pursuant to sec. NR 161.04(3), Wis. Adm. Code, should the Department have awarded the Lake Como project (#4466-01) the same priority score as WALCOMet?

The proposed Lake Como project will collect wastewater from a currently unsewered area on the north shore of Lake Como in Walworth County and transport it to the WALCOMet sewage treatment plant for treatment. The WALCOMet sewage treatment plant discharges into Turtle Creek, 9.9 miles upstream from a point at which Turtle Creek is designated as an ERW. Lake

Como argues that because its project may impact an ERW, its project is entitled to an additional five points in the priority scoring pursuant to sec. NR 161.03(5), Wis. Adm. Code.

Originally, Lake Como sought the five ERW points because of expected, negative impacts on the ERW segment of Turtle Creek. The administrative law judge issued a ruling dated February 7, 1997, finding that awarding ERW points for a negative impact on an ERW was inconsistent with the intent of the statute and that the ERW points were only available if the impact on the ERW was positive. As a result of the ruling, at the hearing Lake Como attempted to show a positive impact on the ERW as a result of Lake Como's discharge.

In general, Lake Como attempted to show a positive impact on the ERW by providing evidence that WALCOMet's discharge consists of higher quality water than the water immediately upstream of the discharge site. WALCOMet's discharge water is higher in quality primarily in terms of turbidity, levels of dissolved oxygen, and lower temperature. Although witnesses for the Department testified that clearer water, containing higher levels of dissolved oxygen and having a lower temperature than the water in Turtle Creek may not necessarily constitute a benefit to the ERW segment of Turtle Creek, as a generality one can say that the discharged wastewater is of higher quality than the water above the discharge site.

If one accepts this assumption, the issue becomes whether any of the benefits of the higher quality water may reach the ERW segment of Turtle Creek. As mentioned above, the petitioners presented evidence that the discharge water was of higher quality than the water in Turtle Creek immediately above the discharge site. Other than portions of a 1994 Turtle Creek Priority Watershed: Bioassessment Final Report, the petitioners presented no evidence of the quality of the water at the ERW segment of Turtle Creek. The Department witnesses testified that any benefits from the discharged water will be localized within the stream segment immediately below the discharge site. The water in Turtle Creek will return to its equilibrium long before it reaches the ERW segment.

There is no evidence that the water quality of the WALCOMet discharge currently has any impact on the ERW segment of Turtle Creek. Adding the Lake Como discharge to the WALCOMet flow may incrementally impact on Turtle Creek. However, if there is no evidence that WALCOMet's discharge has any positive impact on the ERW segment of Turtle Creek, one can not find that an incremental addition to the flow may impact the ERW segment of Turtle Creek.

Another positive impact alleged by Lake Como is simply an increase in the volume of water in Turtle Creek. The petitioners argue a greater volume of water will benefit the ERW segment of Turtle Creek in two ways. One benefit is simply more water during periods of low flow. (James Eagan, a witness for the petitioners calculated that during low flow periods the Lake Como wastewater will contribute 3.1% of the total stream flow of Turtle Creek at the ERW segment at daily average flow conditions and 7.4% at daily peak flow conditions.) The Turtle Creek ecosystem has adapted to the amount of water in the ERW segment of Turtle Creek. It is oversimplistic to find that simply increasing the amount of water in Turtle Creek during periods of low flow constitutes a positive impact. Accordingly, based on the evidence in the record, one

cannot find that the addition of the Lake Como discharge to WALCOMet's flow may positively impact on the ERW segment of Turtle Creek.

The petitioners also argue that a greater volume of water may positively impact the ERW segment of Turtle Creek by diluting nonpoint source pollution (mainly agricultural runoff) in the Turtle Creek drainage area. Rural nonpoint source pollution occurs mainly when rainwater or snowmelt runs across a barnyard or farm field into the stream and carries with it phosphorus, sediment, nitrates, and other pollutants. When this nonpoint source pollution occurs, the flow in the stream is high due to the added rainwater or snowmelt. Department witnesses testified that any dilution from the Lake Como discharge will be insignificant.

In its posthearing brief, the Department argued that Lake Como is not entitled to the ERW points because it is a collection system not a treatment system. The project is only intended to move wastewater from one drainage basin to another and will have no impact on water quality. Although this argument is logical, there is no indication in sec. NR 161.03(5), Wis. Adm. Code, that collection systems are not eligible for ERW points. Based on the finding that the record contains no evidence that the Lake Como project may impact on the ERW segment of Turtle Creek, it is not necessary to resolve this issue at this time. However, it does appear that the more rational way to approach this project is to determine whether Lake Como is entitled to the same priority score as WALCOMet rather than attempting to determine the incremental impact of the additional flow from Lake Como to the WALCOMet district.

The project is entitled to the same priority score as WALCOMet if it meets the three criteria of sec. NR 161.04(3), Wis. Adm. Code. The two criteria which are at issue are whether "an approved facility plan or WPDES permit requires the receiving community facility [i.e., WALCOMet] expansion and subscribing community [Lake Como] project to occur concurrently," and whether "the receiving community needs to expand its treatment facility design flow by 10% or more to treat the flow from the subscribing community." With respect to the concurrency requirement, the Lake Como project on its face does not meet this criteria. No approved facility plan or WPDES permit requires the projects to occur concurrently.

However, a planning report prepared by the Southeast Wisconsin Regional Planning Commission (SEWRPC) concludes "that the regional water quality management plan should be amended by designating the WALCOMet Sewerage District Treatment facility as the receiving sewage treatment plant for sewage generated in the Como Lake sewer service area." (exhibit 9). The SEWRPC report further notes the addition of the Como Lake area sewage to the WALCOMet facility will not be possible until after completion of a planned plant capacity expansion. For purposes of this opinion, it will be assumed that the spirit of the concurrency requirement is met.

The other criteria, whether the receiving community needs to expand its treatment facility's design flow by 10% or more to treat the flow from the subscribing community, however, is not met. Sec NR 161.04(3)(a), Wis. Adm. Code, requires that the "receiving community needs to expand its treatment facility's design flow, by 10% or more to treat the flow from the subscribing community." (emphasis added) The phrase "design flow" is defined at sec.

161.02(5), Wis. Adm. Code, as "the flow specified in a WPDES permit or approved facilities plan." A WPDES permit or facility's plan can include various flow figures. The Department listed six flow definitions in exhibit 16; average annual flow, average monthly flow, maximum monthly flow, maximum daily flow, maximum hourly flow, and sustained wet weather flow. Department witnesses testified that any one of these flows could be considered for purposes of sec. NR 161.04(3)(a), Wis. Adm. Code.

The only two design flows for which corresponding figures exist for both Lake Como and WALCOMet are average annual flow and peak daily flow. Neither of these design flows for the Lake Como project is 10% of the corresponding design flows for the WALCOMet treatment plant. In order to achieve a 10% figure, the petitioners used a maximum monthly flow calculation for Lake Como which is 2.0 times the average daily flow figure and compared it to the average monthly flow figure for WALCOMet. The petitioners justify using the maximum monthly flow figure for Lake Como, as opposed to the average annual flow, on the assumption that the Lake Como flow will have a greater seasonal variation than the other communities served by the WALCOMet treatment plant. However, the evidence in the record is to the contrary.

The evidence in the record indicates that Lake Como is no longer a seasonal community but has evolved into a community of year-round residences. Witnesses for the petitioners attempted to justify the multiplier by alleging that even though most of the residences in Lake Como are now year-round, a seasonal impact still exists because the number of visitors increases during the summer. This translates into additional usage by commercial establishments such as restaurants and bars, and house guests in residential units. There is no reason to doubt this impact; however, the witnesses for Lake Como did not explain why this impact would be greater in the Lake Como area than in other communities served by WALCOMet.

Additionally, even if one was able to show that the amount of water used in Lake Como increases substantially during the summer, this does not necessarily translate into a comparable increase in wastewater. Many of the purposes for which water is used during the summer, e.g., car washing and lawn watering, do not impact on the amount of wastewater.

In summary, the only two design flows for which corresponding figures exist for both Lake Como and WALCOMet are average annual flow and peak daily flow. Neither of these design flows for the Lake Como project is 10% or more of the corresponding design flow for the WALCOMet treatment plant. The Lake Como project is not entitled to the same priority score as WALCOMet.

#### Conclusions of Law

1. The applicant has not shown that the Lake Como project may impact the ERW segment of Turtle Creek. Accordingly, the Lake Como project is not entitled to five priority points pursuant to sec. NR 161.03(5), Wis. Adm. Code.

2. The Lake Como project is not entitled to the same priority score as WALCOMet because WALCOMet was not required to expand its treatment facility's design flow by 10% to treat the flow from Lake Como.

3. Pursuant to sec. 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The priority score calculated by the Department of Natural Resources for the Lake Como project is affirmed.

Dated at Madison, Wisconsin on May 5, 1997.

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